No. 12,547

IN THE

United States Court of Appeals

For the Ninth Circuit

ADOLPH J. SCHNEE,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Appellee.

APPELLANT'S REPLY BRIEF.

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FOREWORD.

For convenience, the headings of Specification of Error No. 1 in the opening brief (AOB 14-17) are adopted in replying to the arguments of appellee.

THE DISTRICT COURT ERRED IN DIRECTING A VERDICT FOR DEFENDANT UPON MOTION OF THE DEFENDANT. (AOB 14-20.)

Under the law, it was the duty of the trial judge in passing upon the motion for directed verdict to "look only to the evidence and reasonable inferences"

which tended to support the case of plaintiff. *(Wilkerson v. McCarthy,* 336 U.S. 53, 57, 69 S.Ct. 414, 415, 93 L.Ed. 497.) And under the law, it was for the jury and not the trial judge to resolve conflicts of evidence and to pass upon the credibility of witnesses and the weight to be given their testimony. *(Wilkerson v. McCarthy,* 336 U.S. 53, 57-60, 69 S.Ct. 413, 415-417, 93 L.Ed. 497.)

On this appeal, therefore, the appellant was entitled to rely and did rely solely upon the evidence and reasonable inferences which tended to support his case when viewed in the light most favorable to him. Obviously, the nature of the appeal did not and does not require appellant to discuss, nor does it require this court to consider, conflicts of evidence, weight of conflicting evidence, or credibility of witnesses.

It is quite apparent from its brief, however, that appellee has either misconceived the scope of review on an appeal of this nature or is unwilling to abide by the settled rules governing such review. Appellee fashions a statement of facts (AAB 3-7) and a theory of accident (AAB 26-29) by selecting from the record evidence most favorable *to appellee* and attempting, throughout its brief, to dictate the credibility and weight to be given evidence and the inferences to be drawn therefrom. Those, of course, were functions to be performed by the jury in the trial court: they are not functions which an appellee may usurp and dictate to an appellate court.

(a) Res ipsa loquitur.

On the rule that a broad application is to be given the doctrine of *res ipsa loquitur* in Federal Employers' Liability Act cases, it is enough to again refer to *Jesionowski v. Boston & M. R. R. Co.,* 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 355. (AOB 15.)

Appellee contends, however, that the doctrine was here inapplicable for one or the other of two reasons: (a) "The actual cause of the accident is conclusively shown"; (b) "When none of the instrumentalities involved in the accident are in sole control of defendant as to inspection and user" (AAB 11). Neither contention is sound.

Plaintiff testified at the trial that as he was operating defendant's motor car along defendant's tracks and over defendant's roadbed, the motor car left the track and was derailed through no fault of his. (AOB 9.) Under the principles of law announced and applied in the *Jesionowski* case plaintiff was therefore entitled to the benefit of the *res ipsa loquitur* doctrine. It is true that plaintiff also introduced some circumstantial evidence suggesting the grade stake as the definite cause for the accident. Circumstantial evidence of such character is never adequate to defeat the application of the *res ipsa loquitur* doctrine. *(Leet v. Union Pacific R. Co.,* 25 Cal. 2d 605, 155 P. 2d 42.)

Plaintiff told enough at the trial of what he did and how the accident happened to permit the conclusion that the fault was not his. Under the principles of law announced and applied in the *Jesionowski* case

plaintiff was therefore entitled to the benefit of the *res ipsa loquitur* doctrine. The rule is not a new one. *(Metz v. Southern Pac. Co.,* 51 Cal. App. 2d 260, 124 P. 2d 670; *Ronconi v. Northwestern Pac. R. Co.,* 35 Cal. App. 560, 170 P. 635.) The evidence before the court is undisputed that the defendant owned the motor car, the tracks, and the roadbed, and that plaintiff was its employee and acting as such at the time of the accident. If, as the appellee suggests, appellant was charged with some duty or duties respecting maintenance and inspection of the motor car, the tracks, or the roadbed, the question thereby presented was one of fact for the jury and not one of law for the trial court.

(b) Apart from res ipsa loquitur.

In contending that the evidence was insufficient to take the case to the jury, appellee challenges certain statements of fact appearing in appellant's opening brief. For the most part these have reference to the grade stake. It is said, for example, that appellant was in error in stating that the stake was "weathered". (AAB 17-18.) The record supports the statement of appellant that the stake was "weathered". Defendant's witness Ward testified as follows (T 150):

> "The Court. Had this stake been painted?
> A. Not that I would say, no, sir. *It had been weathered* I believe." (Emphasis added.)

Again, appellee challenges the statement that the "grade stake" was in fact a grade stake or surveyor's

stake. (AAB 22.) A witness familiar with grade stakes testified that it was a grade stake. (T 110.) A witness for defendant testified that "it was an ordinary surveyor's stake". (T 142.) That it was the type of stake commonly used by defendant along its right of way and even inside the roadbed, is reasonably inferable. (AOB 13.)

After the accident the stake involved or found at the accident scene was taken into possession by the defendant and placed under lock and key. (T 144.) Defendant did not produce it at the trial, and was content to say that it could not be found. (T 142-143.) The inferences arising from the nonproduction of the grade stake by defendant and the sufficiency of defendant's explanation as to why the stake was not produced, were clearly jury questions. In answer to appellee's elaborate contention that the grade stake had been used by plaintiff and was on the motor car just before the accident (AAB 26-28), it is enough to say that plaintiff gave positive testimony that no grade stake or other piece of wood was on the motor car at or before the accident. (T 401-402.)

Without prolonging the argument, appellant repeats that rational basis for a plaintiff verdict in this case is unmistakable either under or apart from the doctrine of *res ipsa loquitur*.

CONCLUSION.

Appellant therefore respectfully submits that the judgment entered on the directed verdict for defendant should be reversed.

Dated, San Francisco, California,
September 27, 1950.

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